

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

KJELDEN CUNDIFF,

Plaintiff,

v.

DOLLAR LOAN CENTER LLC, et al.,

Defendants.

2:09-CV-02441-PMP-PAL

ORDER

Presently before the Court is Defendants' Motion to Dismiss Amended Complaint (Doc. #27), filed on March 29, 2010. Plaintiff filed an Opposition (Doc. #35) on April 22, 2010. Defendants filed a Reply (Doc. #46) on May 10, 2010.

Also before the Court is Defendants' Motion for Summary Judgment as to All Claims Against Defendant the Charles C. Brennan Living Trust (Doc. #28), filed on March 29, 2010. Plaintiff filed an Opposition (Doc. #32) and a Motion for Denial or Continuance Pursuant to FRCP Rule 56(f) (Doc. #34) on April 17, 2010. Defendants filed a Reply (Doc. #44) on May 6, 2010.

I. BACKGROUND

According to Plaintiff Kjelden Cundiff ("Cundiff"), Defendant Charles C. Brennan ("Brennan") was his childhood friend and former schoolmate. Plaintiff alleges that Brennan solicited him to leave his corporate position with Pillsbury Company in Minnesota to go to work for Brennan in Las Vegas. At that time, Brennan was operating a sole proprietorship business doing business as Dollar Loan Center, and was preparing to commence a collection agency doing business as Clark County Collection Service.

1 Brennan advised Plaintiff that he was going to incorporate a business called Brencor which
2 was going to own and operate Dollar Loan Center and Clark County Collection Service.
3 Cundiff contends he did not want to leave his Pillsbury job prior to May 2001 because he
4 would vest in that company's pension plan if he stayed until then. However, Brennan was
5 insistent that Cundiff start work for him in March 2001, and assured Cundiff that a position
6 with Brencor would surpass the Pillsbury pension.

7 Cundiff alleges that on March 1, 2001, he accepted the employment offer and
8 began to work for Brennan performing management work. Cundiff contends that Brennan
9 never formed Brencor as promised, and instead transferred ownership of Dollar Loan
10 Center and Clark County Collection Service to a living trust, Defendant Charles C. Brennan
11 Living Trust ("Trust"). The Trust then formed Defendants Dollar Loan Center, LLC
12 ("DLC") and Clark County Collection Service, LLC ("CCCS") in April 2002.

13 Cundiff alleges Defendants were supposed to compensate him with a \$4000
14 signing bonus, health and dental insurance, a car allowance, and six months housing
15 allowance until he found a house in Las Vegas. Additionally, he was to receive an annual
16 salary increasing each year from his first through fifth years of employment from \$60,000 to
17 \$100,000, and then continuing at \$100,000 for the fifth through fifteenth years of
18 employment, and a one percent ownership interest in the business starting March 1, 2007 to
19 be capped at a ten percent ownership interest after fifteen years.

20 Cundiff alleges he left Minnesota and came to Nevada to work for Defendants,
21 starting in March 2001 until October 21, 2009. However, Cundiff contends Defendants did
22 not live up to the bargain, by failing to pay for his full monthly salary as set forth in the
23 agreement, by failing to pay for his health insurance, by refusing to pay his salary due and
24 owing for November 2009 through March 2016, and failing to transfer one percent interest
25 in the company on March 1, 2007, 2008, and 2009. Cundiff contends that when he brought
26 these breaches to Defendants' attention on October 21, 2009, Defendants fired him within

1 the hour. Plaintiff alleges Defendants thus breached the contract by firing him and also by
2 anticipatorily breaching the ownership interest transfers for the remaining years of the
3 contract.

4 Cundiff therefore asserts claims for (1) breach of contract, (2) breach of the
5 implied covenant of good faith and fair dealing, (3) declaratory relief that he had a valid and
6 binding employment contract and/or that Defendants violated Nevada law by making false
7 representations to induce him to leave his job in Minnesota and move to Nevada, (4)
8 negligent misrepresentation, (5) unjust enrichment, (6) luring employee under false
9 pretenses under Nevada Revised Statutes § 613.010, (7) promise with an intent not to
10 perform, (8) promissory estoppel, and (9) constructive trust. Defendants now move to
11 dismiss. Defendants also move for summary judgment, arguing the Trust is not a proper
12 party to this litigation. Plaintiff opposes both motions and moves for a denial or
13 continuance pursuant to Federal Rule of Civil Procedure 56(f).

14 **II. MOTION TO DISMISS (Doc. #27)**

15 In considering a motion to dismiss, “all well-pleaded allegations of material fact
16 are taken as true and construed in a light most favorable to the non-moving party.” Wyer
17 Summit P’ship v. Turner Broad. Sys., Inc., 135 F.3d 658, 661 (9th Cir. 1998) (citation
18 omitted). However, the Court does not necessarily assume the truth of legal conclusions
19 merely because they are cast in the form of factual allegations in the plaintiff’s complaint.
20 See Clegg v. Cult Awareness Network, 18 F.3d 752, 754-55 (9th Cir. 1994). There is a
21 strong presumption against dismissing an action for failure to state a claim. Ileto v. Glock
22 Inc., 349 F.3d 1191, 1200 (9th Cir. 2003). A plaintiff must make sufficient factual
23 allegations to establish a plausible entitlement to relief. Bell Atl. Corp. v Twombly, 550
24 U.S. 544, 556 (2007). Such allegations must amount to “more than labels and conclusions,
25 [or] a formulaic recitation of the elements of a cause of action.” Id. at 555.

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1 **A. Count one - breach of contract**

2 In Nevada, an employment contract presumptively is terminable at will. Martin
 3 v. Sears, Roebuck & Co., 899 P.2d 551, 554 (Nev. 1995); D'Angelo v. Gardner, 819 P.2d
 4 206, 211 (Nev. 1991). An agreement for employment for an indefinite term usually will be
 5 found to be an at-will relationship. Bally's Grand Employees' Fed. Credit Union v.
 6 Wallen, 779 P.2d 956, 958 (Nev. 1989). "Generally, an at-will employment contract can be
 7 terminated whenever and for whatever cause by an employer without liability for wrongful
 8 discharge if the employment is not for a definite term and if there is no contractual or
 9 statutory restrictions on the right of discharge." Smith v. Cladianos, 752 P.2d 233, 234
 10 (Nev. 1988).

11 Although employment generally is at-will, "an employer may expressly or
 12 impliedly agree with an employee that employment is to be for an indefinite term and may
 13 be terminated only for cause or only in accordance with established policies or procedures."
 14 D'Angelo, 819 P.2d at 211; see also Martin, 899 P.2d at 554. This is known as a "contract
 15 of continued employment." D'Angelo, 819 P.2d at 211 (quotation marks omitted).
 16 Additionally, an employer may bind itself to a term of lifetime employment if the parties
 17 expressly so agree, and consideration is given therefor. Shoen v. Amerco, Inc., 896 P.2d
 18 469, 473-74 (Nev. 1995) (holding plaintiff could enforce lifetime employment agreement
 19 where lifetime term was express and fifty-nine-year-old employee gave consideration in
 20 agreeing to not to provide his services to any competitor for the remainder of his life, and
 21 circumstances indicated the contract was the plaintiff's retirement deal).

22 Here, the document which Plaintiff sets forth as the contract provides as follows:

23 [Y]our starting salary will be \$5,000 per month (\$60,000 per year) and
 will carry a guaranteed progression of the following:

24 1st year	\$60,000 annual salary
25 2nd year	\$70,000 annual salary
26 3rd year	\$80,000 annual salary
4th year	\$90,000 annual salary
5th year	\$100,000 annual salary

After the 5th year of service, your salary will cap at \$100,000 per year and you will begin to receive a percentage of the company to tie you into no-charge ownership of BRENCOR. Each year for the next 10 years, on you[r] anniversary date . . . after 6 years of employment, you will receive 1% interest of the company as a bonus. After a 15 year period with the company, you will be receiving \$100,000 per year and own 10% of the company.

(Am. Compl., Ex. 1.) The contract's plain language establishes that it is for an indefinite period. Although Plaintiff tries to characterize it as a fifteen-year contract, the final sentence of the above-quoted provision plainly states that after fifteen years, Plaintiff would continue to receive a \$100,000 per year salary. The contract is for an indefinite term, and thus presumptively is at-will. As such, Defendants could terminate the contract for any reason without liability so long as there are no contractual or statutory restrictions on Defendants' right of discharge. Plaintiff has not pled any facts supporting a contractual or statutory restriction on Defendants' right of discharge. The Court therefore will grant Defendants' motion to dismiss the breach of contract claim.

B. Count two - breach of covenant of good faith and fair dealing

Because the employment relationship was at will, and thus Defendants could discharge Plaintiff for any reason absent contractual or statutory restrictions, Plaintiff cannot state a claim for breach of the covenant of good faith and fair dealing. Martin, 899 P.2d at 555. The Court therefore will grant Defendants' motion to dismiss this claim.

C. Count three - negligent misrepresentation

Nevada has not addressed whether a misrepresentation as to future performance can be negligent. "Where the state's highest court has not decided an issue, the task of the federal courts is to predict how the state high court would resolve it." Giles v. Gen. Motors Acceptance Corp., 494 F.3d 865, 872 (9th Cir. 2007) (quotation omitted). "In answering that question, this court looks for 'guidance' to decisions by intermediate appellate courts of the state and by courts in other jurisdictions." Id. (quotation omitted).

The Court concludes Nevada would hold that a misrepresentation as to future

1 performance cannot be negligent because such a statement is either fraudulent, i.e., the
 2 person never held that intention at the time he made the statement, or it was not a
 3 misrepresentation at all, the person simply later failed to perform as promised. As stated by
 4 the Restatement (Second) of Torts § 530:

5 To be actionable the statement of the maker's own intention must be
 6 fraudulent, which is to say that he must in fact not have the intention
 7 stated. If he does not have it, he must of course be taken to know that
 8 he does not have it. If the statement is honestly made and the intention
 in fact exists, one who acts in justifiable reliance upon it cannot
 maintain an action of deceit if the maker for any reason changes his
 mind and fails or refuses to carry his expressed intention into effect.

9 California specifically rejected an attempt to base a negligent misrepresentation claim on an
 10 allegedly negligent false promise of future performance:

11 Simply put, making a promise with an honest but unreasonable intent
 12 to perform is wholly different from making one with no intent to
 13 perform and, therefore, does not constitute a false promise. Moreover,
 we decline to establish a new type of actionable deceit: the negligent
 false promise.

14 Tarmann v. State Farm Mut. Auto. Ins. Co., 2 Cal. App. 4th 153, 159 (Cal. App. Ct. 1991).

15 The Court concludes Nevada likewise would not recognize such a claim.

16 Here, Plaintiff alleges Brennan misrepresented his intent to perform in the future.
 17 Brennan either intended to perform at the time he entered the contract or he did not. If he
 18 did not intend to perform at the time he made the promise, that is an intentional
 19 misrepresentation, not a negligent misrepresentation. If he intended to perform at the time
 20 he entered the contract, then he made no misrepresentation as to his intentions. The Court
 21 therefore will grant Defendants' motion to dismiss this claim.

22 **D. Count four - unjust enrichment**

23 Defendants contend Plaintiff cannot allege an unjust enrichment claim when he
 24 has alleged the existence of a written contract. Plaintiff responds that he pleads this claim
 25 in the alternative. The Court will grant Plaintiff thirty (30) days to amend to reassert this
 26 claim without including or incorporating by reference any allegation that the parties entered

1 into an enforceable contract.

2 **E. Count five - Nev. Rev. Stat. § 613.010**

3 Defendants move to dismiss this claim, alleging it only applies when a person
4 induces another to move from one place or another within the state of Nevada, or induces
5 the person to move into the state to work in a department of labor of the state, as in a
6 governmental body. Defendants argue they did not induce Plaintiff to move within the
7 state, and they did not induce Plaintiff to work in a department of labor in the state.
8 Defendants also argue the statute does not apply to highly compensated executives, as it
9 applies to “workmen.” Additionally, Defendants contend Plaintiff must allege they induced
10 him to come here using false representations or under false pretenses, and Plaintiff has not
11 pled fraud with particularity. Finally, Defendants argue DLC and CCCS cannot be liable
12 because they did not even exist at the time of any alleged false statements.

13 Plaintiff responds that the relevant statutory section applies to him because it
14 refers to “workmen of any class or calling,” which would include any employee. Plaintiff
15 also contends it does not apply just to state departments of labor, as the statute makes liable
16 any person, company, corporation, or organization.

17 Nevada Revised Statutes § 613.010 provides as follows:

18 1. It shall be unlawful for any person, persons, company, corporation,
19 society, association or organization of any kind doing business in this
20 state by himself, herself, itself, themselves, his, her, its or their agents
21 or attorneys to induce, influence, persuade or engage workers to
22 change from one place to another in this state, or to bring workers of
23 any class or calling into this state to work in any of the departments of
24 labor in this state, through means of false or deceptive representations,
25 false advertising or false pretenses concerning:

26 (a) The kind and character of the work to be done;
(b) The amount and character of the compensation to be paid for
such work;
(c) The sanitary or other conditions of their employment; or
(d) The existence or nonexistence of a strike or other trouble
pending between the employer and employees at the time of or prior to
such engagement, proposal or contract for such employment of
workers.

2. Any person, persons, company, corporation, society,

1 association or organization of any kind doing business in this state, as
 2 well as his, her, their or its agents, attorneys, servants or associates,
 3 violating any of the provisions of subsection 1 is guilty of a gross
 4 misdemeanor.

5 3. Any worker of this state or any worker of another state who has been
 6 or shall be influenced, induced or persuaded to engage with any person
 7 mentioned in subsection 1, or any company, corporation, society or
 8 organization mentioned in subsection 1, through or by means of any of
 9 the things therein prohibited, shall have a cause of action for recovery
 10 and may recover at law for all damages that the worker shall have
 11 sustained in consequence of the false or deceptive representations,
 12 false advertising or false pretenses used to induce the worker to change
 13 his or her place of employment, or place of abode in case such worker
 14 shall not be then employed at the time of such inducement and hiring,
 15 against any person or persons, corporations, companies or associations
 16 directly or indirectly causing such damages. In any action under this
 17 section for the recovery of such damages, the court shall have the
 18 power to award a reasonable attorney's fee in favor of the prevailing
 19 party, which fee shall be taxed as costs against the losing party therein.

20 Nev. Rev. Stat. § 613.010. Nevada never has addressed this statute's meaning. The Court
 21 therefore must predict how Nevada's highest court would resolve the issue. Giles, 494 F.3d
 22 at 872.

23 Under Nevada law, statutory construction is a question of law for the Court.
 24 Richardson Constr., Inc. v. Clark County Sch. Dist., 156 P.3d 21, 23 (Nev. 2007). The
 25 Court should construe the statute to give effect to the Legislature's intent. Id. The Court
 26 begins with the statute's plain statutory language, giving effect to any unambiguous
 language. Id. If the statutory language is ambiguous, the Court must "examine the statute
 in the context of the entire statutory scheme, reason, and public policy to effect a
 construction that reflects the Legislature's intent." Id.

By its plain language, the statute is not restricted to employment with a
 governmental department of labor, as Defendants argue. First, liability will attach to any
 person, persons, company, corporation, society, association or organization of any kind
 doing business in this state. Thus, it appears to extend to private employment, and is not
 focused on inducing employment with the State as a governmental employer. Moreover,
 subsection three provides that a worker "who has been or shall be influenced, induced or

1 persuaded to engage with any person mentioned in subsection 1, or any company,
2 corporation, society or organization mentioned in subsection 1,” has a cause of action. Id.
3 § 613.010. Thus, the statute contemplates the worker will “engage with” private
4 organizations, and if that engagement is obtained through the prohibited means, the worker
5 will have a cause of action.

6 As to Defendants’ second argument, there is no basis to exempt managerial
7 employees from this statute’s reach. The statute covers “workers of any class or calling.”
8 The statute does not contain an exemption for highly paid executives or management.
9 Moreover, as discussed below, Plaintiff adequately pleads falsity with particularity as to
10 Brennan. The Court therefore will deny Defendants’ motion to dismiss this claim as to
11 Defendant Brennan. However, as to DLC, CCCS, and the Trust, Plaintiff has not alleged
12 with particularity how these Defendants would be liable under the statute when they did not
13 even exist at the time of the alleged misrepresentations that induced Plaintiff to come to
14 Nevada. The Court therefore will dismiss this claim as to these Defendants, without
15 prejudice to Plaintiff amending his Complaint within thirty (30) days to plead such facts
16 with particularity if there is a sufficient basis for doing so.

17 **F. Count six - declaratory judgment**

18 Plaintiff’s declaratory claims are duplicative of his substantive claims, and add
19 nothing to this litigation. The Court, in its discretion, therefore will dismiss the request for
20 declaratory relief. See Government Employees Ins. Co. v. Dizol, 133 F.3d 1220, 1225
21 (9th Cir. 1998) (stating that avoidance of duplicative litigation is one reason for a district
22 court to decline exercising jurisdiction over a claim for declaratory relief); Tempco Elec.
23 Heater Corp. v. Omega Eng’g, Inc., 819 F.2d 746, 749 (7th Cir. 1987) (affirming denial of
24 declaratory relief where it would “serve no useful purpose”).

25 **G. Count seven - intent not to perform**

26 In Nevada, the failure to fulfill a promise to perform in the future may give rise to

1 a fraud claim if the promisor “had no intention to perform at the time the promise was
 2 made.” Bulbman, Inc. v. Nev. Bell, 825 P.2d 588, 592 (Nev. 1992). To state a fraud claim,
 3 the plaintiff must allege:

- 4 1. A false representation made by the defendant;
- 5 2. Defendant’s knowledge or belief that the representation is false (or
 6 insufficient basis for making the representation);
- 7 3. Defendant’s intention to induce the plaintiff to act or to refrain from
 8 acting in reliance upon the misrepresentation;
- 9 4. Plaintiff’s justifiable reliance upon the misrepresentation; and
- 10 5. Damage to the plaintiff resulting from such reliance.

11 Id.

12 Plaintiff must plead his fraud claim with particularity. Fed. R. Civ. P. 9(b).
 13 Federal Rule of Civil Procedure 9(b) requires that “[i]n alleging fraud or mistake, a party
 14 must state with particularity the circumstances constituting fraud or mistake.” To satisfy
 15 this burden, the complaint ““must set forth more than the neutral facts necessary to identify
 16 the transaction.”” Yourish v. Cal. Amplifier, 191 F.3d 983, 993 (9th Cir. 1999) (footnote
 17 omitted) (quoting In re GlenFed Sec. Litig., 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc)).
 18 The “neutral facts” mean the ““time, place, and content of an alleged misrepresentation.””
 19 Id. at 993 n.10 (quoting GlenFed, 42 F.3d at 1547-48). In addition to pleading these neutral
 20 facts, the plaintiff ““must set forth what is false or misleading about a statement, and why it
 21 is false. In other words, the plaintiff must set forth an explanation as to why the statement
 22 or omission complained of was false or misleading.”” Id. (quoting GlenFed, 42 F.3d at
 23 1548).

24 Plaintiff alleges that he met with Brennan in fall 2000 in Minneapolis, and that in
 25 November 2000, Brennan faxed to Plaintiff the employment offer. (Am. Compl. at 13.)
 26 Plaintiff alleges he then flew to Las Vegas shortly after Thanksgiving and during this trip
 Brennan recruited Plaintiff to accept employment with him. (Id.) Plaintiff further alleges
 he came to Las Vegas again around New Year’s Eve 2000, during which trip Brennan again
 solicited him. (Id. at 13-14.) Plaintiff alleges Brennan advised him Brennan was going to

1 form Brencor and Plaintiff would be vice president, and eventually Plaintiff would obtain
2 an ownership interest in the businesses. (Id. at 14.) According to Plaintiff, he relied on
3 these representations, specifically the representation of future ownership, and quit his prior
4 employment and moved to Nevada to accept the position. (Id. at 14-15.) Plaintiff alleges
5 that “[a]t the time that Defendant Brennan made the representation that Plaintiff would earn
6 and be given an ownership interest in the businesses, he had no intention of performing on
7 this promise.” (Id. at 15.) Plaintiff alleges he was damaged as a result of his reliance on
8 Brennan’s misrepresentation. (Id. at 16.)

9 Plaintiff thus has alleged the who (Brennan), the what (misrepresentations about
10 employment terms including ownership interest), when (late 2000, early 2001), and where
11 (oral communications during various trips and in employment offer). As to why it was
12 false, Plaintiff alleges Brennan had no intention of performing at the time he made the
13 representations. By Plaintiff’s own allegations, Brennan performed under the contract’s
14 terms for four years. Although that undermines an argument that at the time Brennan made
15 the statements they were false, viewing the allegations in the light most favorable to
16 Plaintiff, Plaintiff plausibly has alleged that Brennan did not intend to fulfill his promises
17 when he made them. It is plausible that Brennan intended to induce Plaintiff to work for
18 him for several years before the ownership interest clause was triggered, but never intended
19 to live up to the promise of granting Plaintiff ownership interests. The Court therefore will
20 deny Defendants’ motion to dismiss this claim as to Brennan.

21 However, Plaintiff has not alleged with particularity how or why Defendants
22 DLC, CCCS, or the Trust are liable for this claim. None of these entities existed at the time
23 the alleged misrepresentations were made. The Court therefore will dismiss this claim as to
24 these Defendants, without prejudice to Plaintiff amending his Complaint within thirty (30)
25 days to plead such facts with particularity if there is a sufficient basis for doing so.

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1 **H. Count eight - promissory estoppel**

2 Defendants move to dismiss this claim, arguing Plaintiff cannot plead a
3 promissory estoppel claim because he already has alleged a breach of contract claim. As
4 the Court is dismissing the breach of contract claim, the Court will grant Plaintiff thirty (30)
5 days in which to amend to reassert the promissory estoppel claim without including or
6 incorporating allegations of a valid, enforceable contract between the parties.

7 **I. Count nine - constructive trust**

8 In Nevada, a constructive trust is “a remedial device by which the holder of legal
9 title to property is held to be a trustee of that property for the benefit of another who in good
10 conscience is entitled to it.” Locken v. Locken, 650 P.2d 803, 804-05 (Nev. 1982). A
11 constructive trust may be appropriate where: “(1) a confidential relationship exists between
12 the parties; (2) retention of legal title by the holder thereof against another would be
13 inequitable; and (3) the existence of such a trust is essential to the effectuation of justice.”
14 Id. at 805.

15 A constructive trust is a remedy, not a cause of action. Consequently the Court
16 will not “dismiss” it, as it is not an independent claim.

17 **III. MOTION FOR SUMMARY JUDGMENT (Doc. #28)/RULE 56(f) MOTION**
18 **(Doc. #34)**

19 Defendant Trust moves for summary judgment, arguing that because it was not
20 formed until February 11, 2002, it could not have committed any of the actions Plaintiff
21 alleges as the basis for his claims. Trust therefore argues the Court should grant summary
22 judgment in its favor on all claims. Plaintiff responds by arguing that the Trust is an
23 indispensable party under Federal Rule of Civil Procedure 19 either because it holds legal
24 title to Plaintiff’s alleged equitable interest in the businesses. Plaintiff also moves under
25 Federal Rule of Civil Procedure 56(f) for a denial of the Trust’s motion to pursue discovery
26 as to the ownership structure of the various businesses. Plaintiff contends that discovery

1 will show that Brennan's interests in DLC and CCCS were transferred into or are owned by
2 the Trust. In reply, the Trust argues that it is not an indispensable party because Brennan is
3 the trustee, and the Court therefore could order him, as Trustee, to transfer any interest in
4 the companies. The Trust also argues that Plaintiff presents no evidence raising an issue of
5 fact that the Trust owns any interest in the companies, as Plaintiff's affidavit is based solely
6 on hearsay.

7 In the interest of justice, the Court may grant additional time for discovery where
8 the opposing party to a motion for summary judgment has presented by affidavit, compliant
9 with Rule 56(f), that they cannot obtain facts essential to the opposition of the motion. Fed.
10 R. Civ. P. 56(f). However, a party seeking further discovery under Rule 56(f) bears the
11 burden to make clear "what information is sought and how it would preclude summary
12 judgment." Nicholas v. Wallenstein, 266 F.3d 1083, 1088-89 (9th Cir. 2001) (quoting
13 Margolis v. Ryan, 140 F.3d 850, 853 (9th Cir. 1998)). As the United States Court of
14 Appeals for the Second Circuit has noted, "it is clear that a plaintiff cannot defeat a motion
15 for summary judgment by merely restating the conclusory allegations contained in his
16 complaint, and amplifying them only with speculation about what discovery might
17 uncover." Contemporary Mission, Inc. v. U.S. Postal Serv., 648 F.2d 97, 107 (2d Cir.
18 1981).

19 Pursuant to Federal Rule of Civil Procedure 19(a), a party must be joined as a
20 "necessary" party in two circumstances: "(1) when complete relief is not possible without
21 the absent party's presence, or (2) when the absent party claims a legally protected interest
22 in the action." In re County of Orange, 262 F.3d 1014, 1022 (9th Cir. 2001) (quotation
23 omitted). If the Court finds an absent party is "necessary" under either of these tests, the
24 Court then determines whether joinder is feasible. E.E.O.C. v. Peabody W. Coal Co., 400
25 F.3d 774, 779 (9th Cir. 2005). If joinder of the necessary party is feasible, then the party
26 will be joined and the action will proceed. Id.

1 Generally, a trust is not a necessary or indispensable party where the trustee is
2 named as a party. See, e.g., Sunbelt Envmtl. Servs., Inc. v. Rieder's Jiffy Market, Inc., 138
3 S.W.3d 130, 134 (Mo. App. Ct. 2004) (trustees and beneficiaries are necessary parties); W.
4 Life Trust v. State, 536 N.W.2d 709, 712 (N.D. 1995) (trustee is real party in interest);
5 Colo. Springs Cablevision, Inc. v. Lively, 579 F. Supp. 252, 254 (D. Colo. 1984) (trustee
6 was properly named defendant and trust therefore was not indispensable).

7 In the interest of justice, the Court will grant Plaintiff's Rule 56(f) motion. The
8 question of whether the Trust owns Brennan's interests in DLC and CCCS should be a very
9 straightforward matter and easily ascertainable at little to no discovery costs to the parties.
10 Although a trust generally is not a necessary party where the plaintiff has sued the trustee,
11 nothing prevents the Trust's trustee from changing at any time. Plaintiff seeks as a potential
12 remedy the turnover of ten percent ownership in the businesses. To the extent Plaintiff
13 prevails and shows this is the remedy to which he is entitled, such ownership interest would
14 have to be taken from the current owner, and Plaintiff contends further discovery will show
15 the Trust is the current owner. Consequently, the Trust may be a proper nominal defendant,
16 not accused of wrongdoing itself, but with interests which may be affected by this litigation
17 and without whose participation complete relief cannot be afforded. The Court therefore
18 will grant Plaintiff's Rule 56(f) motion and will deny Defendant Trust's motion for
19 summary judgment.

20 **IV. CONCLUSION**

21 IT IS THEREFORE ORDERED that Defendants' Motion to Dismiss Amended
22 Complaint (Doc. #27) is hereby granted in part and denied in part. The motion is granted as
23 to counts one, two, three, and six as to all Defendants. The motion also is granted as to
24 counts five and seven as to Defendants Dollar Loan Center, LLC, Clark County Collection
25 Service, LLC, and the Charles C. Brennan Living Trust, without prejudice to amend to
26 allege facts supporting liability as to these Defendants on these claims. The motion is


1 denied in all other respects.

2 IT IS FURTHER ORDERED that Defendants' Motion for Summary Judgment as
3 to All Claims Against Defendant the Charles C. Brennan Living Trust (Doc. #28) is hereby
4 DENIED.

5 IT IS FURTHER ORDERED that Plaintiff's Motion for Denial or Continuance
6 Pursuant to FRCP Rule 56(f) (Doc. #34) is hereby GRANTED.

7 IT IS FURTHER ORDERED that Plaintiff shall file an amended complaint
8 within thirty (30) days of the date of this Order.

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10 DATED: July 29, 2010

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12 PHILIP M. PRO
13 United States District Judge
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